
In the Matter of the Compensation of
KATHERINE A. WHITNER, Claimant
Own Motion No. 22-00022OM
OWN MOTION ORDER ON RECONSIDERATION
Peter Hansen, Claimant Attorneys
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Ogawa and Ousey.

On February 22, 2023, we issued an Own Motion Order that: (1) found that claimant's Own Motion claim for a "worsened condition" was not prematurely closed; and (2) affirmed a June 29, 2022, Own Motion Notice of Closure that did not award permanent disability benefits for a "worsened condition" claim for her previously accepted lumbar strain and recurrent left Spigelian hernia conditions. In finding that the claim was not prematurely closed, we reasoned that Dr. Agrawal had considered her chronic pain and several other diagnoses, but did not relate those conditions as medical sequelae to her accepted conditions. Moreover, we found that the record persuasively established that, since November 23, 2020, no further medical improvement of claimant's accepted conditions (or any alleged "direct medical sequelae") would reasonably be expected from medical treatment or the passage of time. In addition, because the claim was reopened for "worsened conditions" that were in Own Motion status, we concluded that claimant was not statutorily entitled to a permanent disability award. *See* ORS 656.278(1)(a); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *Richard D. Slocum*, 67 Van Natta 2180, 2184 n 4 (2015) (no entitlement to PPD/PTD evaluation on closure of reopened Own Motion "worsened condition" claim).

Claimant has timely requested reconsideration of our order to request that the case be referred to the Hearings Division for a hearing before an Administrative Law Judge (ALJ) and to further address the premature closure reasoning and her entitlement to additional permanent disability benefits, including permanent total disability (PTD). OAR 438-012-0065(2); *Gladys Biggs*, 54 Van Natta 1094 (2002).

As a preliminary matter, we acknowledge that an evidentiary hearing is permissible when the determination of entitlement to PTD benefits requires a resolution of factual disputes and judgments about a claimant's credibility or veracity regarding willingness and efforts to seek or obtain gainful employment. *Koskela v. Willamette Indus. Inc.*, 331 Or 362, 382 (2000). Likewise, such "hearing referrals" have been made when the record is insufficiently developed to

determine a worker's entitlement to PTD benefits and when credibility is at issue. *See, e.g., Laura A. Heisler*, 55 Van Natta 3974, 3975 (2003) (referral for evidentiary hearing where the record was insufficiently developed to determine PTD issue). However, “fact-finding” hearings are unnecessary where the record is sufficiently developed, and the claimant’s credibility or veracity concerning willingness to seek regular gainful employment and reasonable efforts to do so is not at issue. *See Lloyd D. Irwin, Jr.*, 70 Van Natta 797, 801-02, *recons*, 70 Van Natta 1093 (2018)

Here, the record concerns whether claimant’s Own Motion claim that was reopened for “worsened conditions” was prematurely closed and whether her reopened “worsened conditions” resulted in entitlement to permanent disability benefits (including PTD benefits). However, as explained in our prior order, claimant is not statutorily entitled to additional permanent disability benefits for her “worsened conditions.” Moreover, both parties have had a full opportunity to present documentary evidence and have availed themselves of that opportunity. Finally, in presenting her written arguments, claimant has previously asserted that there is sufficient information in the record to establish her entitlement to PTD.

Because our assessment of claimant’s entitlement to additional permanent disability benefits in her reopened “worsened condition” claim does not require us to assess and resolve her credibility and veracity, and because there is sufficient evidence to analyze whether claimant is entitled to PTD benefits in those circumstances, we conclude that, based on this particular record, a “fact-finding” hearing is unnecessary. *See, e.g., Irwin, Jr.*, 70 Van Natta at 802; *John R. Taylor*, 68 Van Natta 1866, 1871 n 4 (2016) (referral for fact-finding hearing unnecessary where both parties availed themselves of full opportunity to present documentary evidence and the record was sufficiently developed); *Michelle A. Griffith*, 68 Van Natta 1505, 1512 n 4, *recons*, 68 Van Natta 1731 (2016) (“fact-finding” hearing unnecessary where the record sufficiently was developed and the claimant asserted that there was sufficient evidence to establish entitlement to PTD). Consequently, the request for a “fact-finding” hearing is denied.

Premature Closure

On reconsideration, claimant contends that we impermissibly relied on Exhibit 24 as persuasive medical evidence that claimant’s medical sequelae from her accepted conditions was medically stationary. Specifically, she asserts that Dr. Agrawal’s “check-the-box” report is not persuasive. However, Dr. Agrawal was provided the definition of medically stationary, including that no further material

improvement would reasonably be expected from medical treatment or the passage of time. *See* ORS 656.005(17). In response to that question, Dr. Agrawal specifically wrote that claimant was medically stationary on November 23, 2020. The record does not otherwise contradict Dr. Agrawal's notation.

Under such circumstances, we find no reason to reject this handwritten opinion by Dr. Agrawal or disturb the reasoning in our prior order.¹ (Ex. 24). Consequently, we adhere to our conclusion that claimant's "worsened condition" claim was not prematurely closed.

PTD

Claimant reasserts that she is entitled to PTD benefits for her reopened Own Motion "worsened condition" claim. Yet, as previously explained, on an Own Motion closure of a "worsened condition" claim, a claimant is not statutorily entitled to additional permanent disability benefits, including PTD benefits.² *See Slocum*, 67 Van Natta at 2184 n 4; *see also Anne M. Hayes*, 71 Van Natta 971, 975 n 5 (2019) (a PTD evaluation would include consideration of permanent disability from the accepted conditions occurring before the expiration of aggravation rights, but would not include consideration of permanent disability from any "worsened condition" after the expiration of aggravation rights); *James S. Daly*, 58 Van Natta 2355, 2362 (2006) (a PTD evaluation concerning an Own Motion claim did not include consideration of permanent disability from any worsened condition after the expiration of a claimant's aggravation rights because to do otherwise would be contrary to the statutory scheme and the rationale expressed in *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004), *Sherlee M. Samel*, 56 Van Natta 931 (2004), and *Jimmie O. Dougan*, 54 Van Natta 1213, *recons*, 54 Van Natta 1552 (2004), *aff'd Dougan v. SAIF*, 193 Or App 767 (2004), *vacated* 339 Or 1 (2005)).

¹ Claimant also contends that Dr. Agrawal's opinion that she was medically stationary is unpersuasive because it was noted by the carrier that they would be happy to provide medical records on claimant's claim dating back to 2004. (Ex. 6). Yet, the record establishes that Dr. Agrawal was aware of claimant's history, including many hernia repairs. (*See* Ex. 7-2). Thus, we decline to discount Dr. Agrawal's opinion on this basis.

² We note that claimant's hearing request from the carrier's denial of her new/omitted medical condition claim for a chronic pain syndrome is currently pending before the Hearings Division. Should her claim be found compensable and an Own Motion claim for that condition is reopened, on closure of that claim, claimant would be entitled to an evaluation of her entitlement to PTD benefits at that time.

Accordingly, we withdraw our February 22, 2023, order. As supplemented herein, we republish our February 22 order. The parties' 30-day rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 27, 2023